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ARTICLE: RECONSIDERING FLOOD v. KUHN

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* Professor of Law, University of Illinois. A.B., J.D., University of California (Berkeley). This Article has been in the making for several years. I have had the opportunity to employ some of the arguments contained herein in testimony before a House committee, see *Baseball's Antitrust Exemption: Hearing Before the Subcomm. on Econ. and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 163-89 (1993) § (hereinafter *Brooks Hearings*), and in a brief filed as pro bono counsel to the Consumer Federation of America and Sports Fans United in *Butterworth v. National League*, 644 So. 2d 1021 (Fla. 1994). For extremely helpful comments on earlier drafts, I wish to thank Jim Brudney, Bill Eskridge, Phil Frickey, Lee Goldman, Warren Grimes, Kit Kinports, John Nowak, Ed Weil, and Nick Zeppos.

SUMMARY:

... Those specializing in sports law have either attacked Flood as a ridiculous decision that improperly distinguished between baseball and other professional sports, or have praised it for waging guerilla warfare on the idea that Section 1 of the Sherman Act should apply to intra-league arrangements by owners of professional sports teams. ... Although Justice Blackmun's majority opinion in Flood was eminently sensible in 1972, as a matter of both judge-created sports law doctrine and the jurisprudential application of stare decisis, this is no longer the case. ... Off-the-record comments, including some attributed to other Justices, ridiculed Justice Blackmun for the content of Part I. ... As a matter of sports/antitrust doctrine, Justice Blackmun had reason for concern that contemporaneous Sherman Act precedents would ruin baseball by outlawing an essential aspect of the game--the reserve system. ... As Eskridge has noted, professional sports owners fit the classic public choice pattern of small group of homogenous, wealthy individuals likely to organize to lobby vigorously against any efforts to take away the antitrust exemption. ... To date, courts have cited the need to maintain a competitive balance as the only justification for trade restrictions involving other sports, and the proposed baseball salary cap seems to fail to meet that standard. ...

TEXT:

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As this article is being written, a strike scuttled one of the most exciting baseball seasons in years and threatens future ones as well. The strike marked the eighth consecutive time the "National Pastime" has been interrupted following the expiration of a labor-management agreement. At the same time, baseball owners steadfastly refuse to appoint a Commissioner for fear that the Commissioner's traditional power to act "in the best interests of baseball" might interfere with their own personal interests. n1 Additionally, two precedents arising out of the National League's refusal to allow the San Francisco Giants to relocate to Tampa Bay pose a serious threat to baseball's historic exemption from the antitrust laws. n2 The litigation follows several congressional inquiries, during which former Commissioner Fay Vincent acknowledged that a significant motivation for baseball owners' reluctance to permit expansion or relocation to Tampa Bay was their desire to keep that area open as a "baseball asset" n3 --a candid admission that many franchises have used the threat to relocate to Tampa in order to force their existing communities to provide generous public subsidies for new stadia at below market rents. n4 Moreover, even if the 1994 season had

been completed, a new broadcast agreement signed by baseball's moguls would have denied fans, for the first time since national telecasting began, the opportunity to watch all post-season games on over-the-air television. Combined with the looming threat of pay-per-view, baseball fans may well be forced to pay to watch games they can now view for free.

Each of these woes can be traced directly to the monopoly power that Major League Baseball exercises--power that is attributable to the judicially created exemption baseball enjoys from the antitrust laws. This exemption was last ratified by the Supreme Court in its 1972 decision in *Flood v. Kuhn*.ⁿ⁵ Flood's specific holding was that the historic "reserve clause," by which clubs agreed never to compete for the services of players who were the "property" of another team, was exempt from antitrust scrutiny. At the time, the Court believed that requiring clubs to compete under the antitrust laws would ruin the sport. Today, by contrast, it appears that the Court's assumption is wrong: (1) the competition for players resulting from developments in labor law has helped, not hurt, the sport; (2) allowing owners to demand that players agree to excessive restrictions on competition, and depriving players of the option of filing an antitrust suit to block such restrictions, has increased, rather than decreased, labor strife; and (3) permitting baseball owners to conspire to block expansion or relocation into lucrative areas has hurt fans and taxpayers, both in these areas and in communities with existing teams. Given the current labor [*171] dispute and the recent precedents about franchise location, reconsideration of the holding in *Flood v. Kuhn* could not be timelier.

Within the academia, two very different groups of legal scholars have devoted a great deal of attention to *Flood*. Those specializing in sports law have either attacked *Flood* as a ridiculous decision that improperly distinguished between baseball and other professional sports, or have praised it for waging guerilla warfare on the idea that Section 1 of the Sherman Act should apply to intra-league arrangements by owners of professional sports teams.ⁿ⁶ Those viewing *Flood* through the lens of statutory interpretation perceive the decision as adhering rigidly to the principle of *stare decisis*; this rigidity has been both praised and criticized, and *Flood* has also been attacked for unjustifiably relying on legislative inaction to infer congressional support for earlier precedents.ⁿ⁷

In this Article, an alternative theory is sketched. Although Justice Blackmun's majority opinion in *Flood* was eminently sensible in 1972, as a matter of both judge-created sports law doctrine and the legisprudential application of *stare decisis*, this is no longer the case. In 1972, Justice Blackmun and his colleagues in the majority were justifiably concerned that applying the Sherman Act to professional baseball might ruin our "National Pastime." However, a brief look at subsequent developments in baseball and in antitrust law clearly demonstrates that the situation has changed. Read in its full context, rather than mechanically, the majority opinion in *Flood* applies a fact-based legisprudential standard to questions of *stare decisis*, not the formalistic approach that some have attributed to it.ⁿ⁸ *Flood* represents neither an un- [*172] thinking invocation of the dead weight of precedent, nor an unsophisticated and unwarranted deference to a congressional failure to overturn the Court's prior decisions. Rather, its holding is much more limited. *Flood* reveals that the Court will adhere to a precedent where it perceives that reliance interests are strong and that the public interest is better served by preserving the precedent. Under this reconsidered view of *Flood*, the Supreme Court today should reach the opposite result and subject baseball to antitrust scrutiny.

This Article is not intended to persuade critics of *Flood v. Kuhn* that Justice Blackmun's opinion was the only correct resolution of the case; the Court could have used the opportunity to subject baseball to the rule of reason standard ultimately applied to sports organizations in 1984.ⁿ⁹ Nor is it intended to persuade *Flood*'s supporters that Major League Baseball is an abusive monopolist that should be subject to the antitrust laws, since that topic has been addressed in detail elsewhere.ⁿ¹⁰ Rather, it is intended to demonstrate that Justice Blackmun's opinion may have been misunderstood.

Flood was written during Justice Blackmun's second full term on the Supreme Court. At the time, some referred to him as the "Minnesota Twin," a moniker that accurately described his love of his hometown baseball team but, as history proved, incorrectly suggested his identification with the more conservative jurisprudence of his fellow Minnesotan, Chief Justice Warren Burger. Over twenty years of hindsight have led to the recognition that, instead of basing his decisions on arid legalities, Blackmun was a jurist committed to deciding cases in their real context and interpreting statutes with an appreciation of the evolving and dynamic quality of law.ⁿ¹¹ Viewed as an example of dynamic and contextual statutory interpretation, *Flood* was a justifiable response by a Court concerned that inflexible application of an 1890 statute would ruin a great American institution. However, courts have since demonstrated that they are able and willing to apply the antitrust laws to [*173] joint ventures in a sophisticated and flexible fashion. Additionally, even though the antitrust monopoly continues, competition among baseball owners for player talent has contributed to a competitive balance and the game's popularity. Thus, it now seems that the specific concerns that had led previously to the *Flood* holding, should now lead to its reversal.

I

Justice Blackmun deserves some of the blame for the misreading of *Flood*. His references to the baseball antitrust exemption as an "anomaly" and an "aberration" obscure the policy arguments he marshalled to support his conclusion that continuing the exemption was necessary in "recognition of baseball's unique characteristics and needs." n12 Recalling Justice Blackmun's self-assessment that his jurisprudence has not significantly changed over the years, n13 several factors suggest that these policy arguments, although not articulated as elegantly as they might have been, or as clearly as Justice Blackmun himself would explain in later years, were, in fact, determinative. First, the Court was convinced that the reserve system, the restraint at issue in *Flood*, n14 was essential for the continued integrity of the game. Second, in 1972, the Court had reason to believe that contemporary antitrust doctrines would condemn many arrangements among owners that are arguably essential to baseball. Neither of these considerations exist today.

A

As even casual students of *Flood* know, Part I of the opinion is an ode to baseball. n15 Without explanation, Justices White and Burger declined to join that part. Off-the-record comments, including some attributed to other Justices, ridiculed Justice Blackmun for [*174] the content of Part I. n16 If *Flood* is seen, however, as a decision grounded in a desire to adopt sound legal rules for sports leagues, Part I makes eminent sense. It was necessary to establish the unique role that baseball plays in American culture, in order to demonstrate that the Court should not--and that Congress probably did not intend to--ruin the "National Pastime" by applying inflexible legal rules. n17

In numerous places, Justice Blackmun's opinion reflected the majority's view that antitrust scrutiny would jeopardize the reserve system and therefore ruin baseball. For example, he cited a noted sports historian's conclusion that baseball had been "saved" by Justice Holmes' decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, Inc.*, n18 that the baseball industry was not part of interstate commerce and thus, not subject to the Sherman Act. n19 Blackmun also quoted approvingly from a House subcommittee report, which concluded that a reserve clause was necessary. n20 Significantly, the opinion quoted from Judge Moore's concurrence in the court of appeals decision, which stated " 'if baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November.' " n21 It also noted that a distinguished scholar, who had participated as an amicus curiae in a prior case, *Toolson v. New York Yankees, Inc.*, n22 had argued that "unbridled competition as applied to baseball would not be in the public interest." n23 Black- [*175] mun also emphasized the trial court's finding that every witness except Curt Flood himself had testified that some form of a reserve clause was desirable. n24

The fact that the *Flood* majority adopted this view is not surprising in light of the brief filed on behalf of the respondents, Commissioner Bowie Kuhn and the American and National Leagues. The respondents devoted ten pages to "the reserve system and the historical, competitive, and economic realities of professional baseball," and forcefully articulated the view, which was widely held in the early 1970s, that competition for player talent (or "free agency") was unworkable in professional sports leagues and that the reserve system was "a necessity." n25 Applying language the Court had used in *Radovich v. National Football League* n26 in explaining why the judicially created antitrust exemption for baseball would not be extended to football, the brief thus marshalled "strong indications that more harm than good would come from an overruling" of the Federal Baseball precedent. All of this makes it clear that the *Flood* majority not only attributed to Congress the view that baseball should not be subject to antitrust regulation, but, in addition, believed it themselves. n27

It is important to recall that concerns about the workability of competition among owners for players' services were supported by the fact that no professional sports leagues had engaged in such competition since the early part of the century, and that many attributed the failures of early leagues to this sort of competition. n28 One need not have been a scholar of sports history to have believed, in 1972, that what is known as "free agency" would harm [*176] the sport. The All-American Football Conference, founded as a rival to the National Football League in the late 1940s, failed because the dominance of its champion, the Cleveland Browns, ruined the league's fan appeal. n29 Fans were well aware that the New York Yankees' dominance of the American League ended in the mid-1960s, about the same time that an amateur draft curtailed the Yankees' ability to sign a disproportionate number of the top high school and college players. n30 Although other professional sports leagues were subject to the antitrust laws, no one had yet challenged the restrictions in those sports, so there were no real-life examples to prove that competition would work.

Today, of course, after almost two decades of experience with free agency, the evidence demonstrates overwhelmingly that ending the reserve system destroyed neither baseball nor its integrity. In fact, to the contrary, academic studies have shown that the reserve system actually hurt competitive balance in baseball. A comparison of

pennant races before and after the reserve system was effectively abolished in 1976 demonstrates that in the post-reserve era, more teams were contenders in the pennant race, more franchises won division titles, and there were fewer "blowouts" with one team dominating the standings. Empirical analysis also disproved the owners' claims that free agency would result in a massive exodus of players to teams in large, warm-weather markets. n31

The logical link between the concern that the reserve system was essential and the need for baseball's antitrust exemption was also explained by the respondents in *Flood*, who described to the Court their concerns about "the radical and abrupt change in baseball's antitrust status . . . from exemption to per se violation." n32 [*177] Applying antitrust's per se rule to baseball would, of course, condemn the reserve system, as well as a host of other agreements among baseball owners.

Just three months before issuing its opinion in *Flood*, the Court decided *United States v. Topco Associates, Inc.* n33 *Topco* held that an agreement to allocate territories by a cooperative of small grocery stores seeking to develop a private label brand was per se illegal. Although the district court had found that the territorial agreement was essential to *Topco*'s efforts to compete successfully against market leaders such as Safeway, A&P, and Kroger, n34 the Supreme Court held that all agreements among competitors to allocate territories were conclusively presumed to be unreasonable under the Sherman Act, without regard to their actual market impact. *Topco* could fairly have been read to suggest that applying the antitrust laws to baseball would automatically have prohibited any form of a reserve clause, as well as the elaborate waiver system for assigning players to the minor leagues, player development contracts with the minor leagues, and a host of other rules. Although Justice Marshall's dissenting opinion in *Flood* suggested that the labor exemption would permit baseball to continue necessary restraints involving players as part of a collective bargaining agreement, n35 this area of the law was not developed in 1972, and no Justice made the argument that legitimate agreements among owners addressing baseball's unique characteristics and needs could be accommodated under contemporary antitrust analysis. Significantly, Justice Blackmun wrote a short concurrence in *Topco*, suggesting that the result was "anomalous" because its effect was to "stultify *Topco* members' competition with the great [*178] and larger chains," but conceding that it was a correct application of precedents applying the per se rule. n36

Today, *Topco*'s broad language suggesting blanket condemnation of restraints among joint ventures is no longer followed. The antitrust laws today, as interpreted by the Court, permit sports leagues to enter into agreements that are necessary to enable them to offer their unique product in the marketplace. n37 In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, n38 the Court made it clear that virtually all agreements among sports league owners will be governed by the rule of reason. Baseball, like college football, is an "industry in which horizontal restraints on competition are essential if the product is to be available at all," n39 and the Court in *Oklahoma Regents* employed a "structured rule of reason," analyzing the defendants' justifications for their restrictions and the "fit" between those ends and the means chosen to achieve them. n40 Consistent with the progenitor of the modern rule of reason, *United States v. Addyston Pipe & Steel Co.*, n41 *Oklahoma Regents* recognized a variety of interests that would support reasonable restraints -- such as competitive balance and the need to preserve sufficient amateurism to distinguish college from minor league professional football. n42

The Court's reasoning in *Oklahoma Regents* contrasts sharply with the attitude of those who, in the context of the antitrust doctrines existing in 1972 and earlier, nonetheless advocated that baseball be subject to the Sherman Act, regardless of the consequences. [*179] n43 Although it is clear that, were the Court to overrule *Flood* today, baseball's antitrust status would surely change, the change would not destroy baseball, but instead would surgically excise those practices that restrict competition while preserving all practices reasonably necessary for the sport to prosper. As court decisions involving other sports demonstrate, if baseball owners were to increase their economic power by engaging in anticompetitive schemes, such as using "dirty tricks" to block the creation of a new league, n44 tying players to overbroad contracts in order to block a new league n45 or to unreasonably prevent players from changing teams, n46 restricting public viewing of popular games to drive up the fees for broadcast rights, n47 and departing from a lax view toward franchise relocation to protect one particular owner, n48 then subjecting them to the antitrust laws would constrain their behavior. Of baseball's current practices, the ones most likely to subject the owners to antitrust liability are the agreement that the National League may not expand or relocate teams without the approval of American League owners (and vice versa), n49 the efforts to impose a salary cap on players, n50 and the refusal to sell satellite broadcast signals outside designated geographic territories. n51 At the same time, it is clear that the Sherman Act permits restrictions on competition for player services that are reasonably necessary to maintain competitive balance within baseball n52 or to preserve the game's integrity. n53 Independent decisions by National and American League owners concerning franchise relocation and expansion should also pose no serious risk of liability, assuming that they do not appear designed simply to insulate a fellow member from com- [*180] petition.

n54 Unique events, such as the World Series and the AllStar Game, are appropriate and lawful areas of collaboration among all teams. n55 Thus, in contrast to 1972, one can confidently predict today that baseball owners would be subject to a sophisticated and flexible rule of reason analysis that would permit them to agree on matters reasonably necessary to accommodate the sport's needs and the owners' legitimate interests.

As a matter of sports/antitrust doctrine, Justice Blackmun had reason for concern that contemporaneous Sherman Act precedents would ruin baseball by outlawing an essential aspect of the game--the reserve system. This concern explains his need to explain his love of the game, and why baseball's "unique characteristics and needs" justified a continued exemption from the Sherman Act. In 1994, it is clear that modern antitrust law can account for baseball's unique needs, and that it is unlikely that a strike-producing salary cap, an output-restricting television rights contract, or the inter-league collusion on franchise relocation and expansion are among them. n56

II

Justice Harry A. Blackmun has often been identified with techniques of statutory interpretation that seek to promote a judicial-legislative dialogue and to further a statute's public purpose. n57 As with every other common technique of statutory interpretation, though, these approaches create the inevitable risk that the Court will erroneously attribute to Congress values shared by a majority of the Justices. n58 Because Flood does not explicitly adopt a dy- [*181] namic or purposive approach to interpretation, critics have faulted its allegedly super-strong presumption against overruling statutory precedents, chided the Court for giving excessive weight to legislative inaction as a basis for statutory interpretation, and dismissed the reliance interests of baseball owners that Justice Blackmun allegedly sought to protect.

Rather than being read statically, Flood should be read dynamically. So read, it reflects neither a super-strong commitment to stare decisis nor an abstract reliance on legislative inaction. Rather, by reading Flood dynamically, it becomes apparent that a number of factors led to the judgment that the Court's prior baseball precedents should not be disturbed: (1) evidence that Congress approved of a continuing antitrust exemption for the very reserve system Curt Flood had challenged; (2) the Court's own view that maintenance of the reserve system was consonant with social welfare; (3) the Court's preference for legislation that would allow baseball to be governed by more flexible legal standards than were permitted by the Sherman Act as interpreted by the Court in 1972; and (4) evidence that baseball owners relied on existing precedents, not simply by anticipating that they would continue to realize monopoly profits, but in the very way they organized the sport. Considered in this light, two conclusions are apparent. First, Flood's critics miss the mark, and second, if the Supreme Court were to revisit the issue, virtually no serious antitrust challenge to Major League Baseball's current practices should be dismissed on authority of Flood v. Kuhn. Today, it is clear that there is no affirmative congressional preference for any Major League Baseball practice likely to face serious antitrust challenge. Additionally, exempting baseball's anticompetitive practices from antitrust scrutiny is no longer consonant with social welfare. Moreover, the Sherman Act as interpreted by the Court in 1995, is sufficiently flexible to handle baseball's needs, and the owners have no claims of justifiable reliance on Flood that would warrant continuing the exemption. [*182]

A

Professor William Eskridge is a leading legisprudential critic of Flood. n59 He has called Flood "the most frequently criticized example of excessively strict stare decisis." n60 Similarly, Dean Paul Rogers has faulted Flood's reliance on congressional inaction as contrary to precedent and result-oriented. n61 These scholars may have been misled because Justice Blackmun did not explicitly base Flood on its contemporary context. n62 In light of the many instances prior to Flood, where the Court had overruled statutory precedents, however, it is possible that Flood was not based solely on such a "comical adherence to the strict rule against overruling." n63

Moreover, Flood did not adhere to the antitrust exemption created by Federal Baseball and Toolson simply because Congress has failed to pass legislation overturning those decisions. Although the passage by the House in 1958 and the Senate in 1965 of legislation continuing the reserve system does not inexorably lead to the conclusion that Congress affirmatively favored continuing the reserve clause, n64 at differing times each chamber had clearly signalled its view that the reserve system should be retained. n65 Of course, [*183] the Court's own view that the reserve system should be preserved made it easier to conclude that Congress felt the same way. Viewing Congress' response to Toolson as affirmatively endorsing the continuation of the reserve system, an endorsement with which the Court agreed, makes this case quite different than if Congress had simply done nothing and the Court did not feel strongly about it either.

In criticizing Flood, Professor Eskridge masterfully refutes the general argument that precedents should be adhered to because the absence of any statutory amendment signals legislative acquiescence to the Court's interpretation. He uses Flood to illustrate the principle that legislative acquiescence should not be inferred from inaction. Artfully drawing on the insights from political science and public choice theory, he lists a variety of explanations for Congress' inaction other than its endorsement of Federal Baseball. He suggests, first, that Congress might have been apathetic or actually disapproving of Federal Baseball, but failed to pass legislation overruling it due to a lack of a consensus on a remedy; second, that a majority might have disapproved of the decision only to be stymied by procedural roadblock erected by the minority; third, that higher priorities and limited time might have precluded a dis- [*184] approving Congress from action; or fourth, that the majority might have agreed to forego corrective legislation in return for political promises on other issues. n66 Recent Supreme Court decisions seem to support Eskridge's view of the unreliability of inaction as a guide to statutory interpretation. n67 Indeed, if Flood were based entirely on legislative inaction, there is little doubt that it would be quickly jettisoned today.

When Eskridge applies his sound arguments to the actual decision in Flood, however, he makes the faulty assumption that Flood held that Congress had acquiesced in the broad exemption created by Federal Baseball. If Flood is viewed, however, as a holding limited to a specific practice (the reserve system) at a specific point in time (1972), Eskridge's critique has much less force. His alternative explanations for Congress' inaction are difficult to reconcile with the strong endorsement of the reserve system found in several committee reports. n68 This endorsement constituted the "positive inaction" on which Justice Blackmun relied. n69 [*185]

At least two courts agree with this analysis. In *Piazza v. Major League Baseball*, n70 a federal district court held that an alleged conspiracy to block the sale of the San Francisco Giants to buyers intending to relocate the franchise to Tampa Bay was not immune from antitrust scrutiny, because Flood limited the exemption to the reserve clause. The court read Flood's acceptance that baseball is a business engaged in interstate commerce as stripping Federal Baseball and Toolson of any precedential value, and focused on Justice Blackmun's language justifying dismissal of Flood's claim on grounds that "baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing antitrust laws." n71 In *Butterworth v. National League of Professional Baseball Clubs*, n72 the Florida Supreme Court held that the state attorney general's investigation of the same conspiracy for possible violations of federal antitrust law n73 could proceed because baseball's antitrust exemption only applied to the reserve clause. Acknowledging that this conclusion was "against the great weight of federal cases regarding the scope of the exemption," the Court nonetheless found the *Piazza* decision persuasive. n74

The improper application of Eskridge's critique of reliance on legislative inaction to the actual decision in Flood should not obscure the soundness of his argument as a general matter of jurisprudence. Legislative acquiescence should be disregarded where a small, well-organized group that would benefit from one interpretation of the legislative record is juxtaposed against a less-organized group whose interpretation is most consistent with the public interest. As Eskridge has noted, professional sports owners fit the classic public choice pattern of small group of homogenous, [*186] wealthy individuals likely to organize to lobby vigorously against any efforts to take away the antitrust exemption. On the other hand, fans who are injured by the baseball exemption are unlikely to organize: they are generally unaware of their injury, and the stakes for each individual are so small that they do not justify extensive lobbying. Under these circumstances, ascribing meaning to congressional inaction tilts the scales in favor of powerful special interests, and refusing to do so reflects a proper judicial effort to balance the scales a bit.

Recent legislative developments concerning the antitrust exemption illustrate both how the "positive inaction" relied on in Flood differs from the more typical situation when a variety of factors can explain congressional inaction, and how baseball legislation reflects the public choice model of special interest lobbying. In the past two years, hearings were held by the antitrust subcommittees in both the House and the Senate. n75 Major League Baseball responded by hiring an influential, full-time lobbyist, and increasing their political contributions. n76 Legislative repeal of the antitrust exemption was publicly supported by the Major League Baseball Players Association, several consumer groups, representatives from Florida who hoped to attract an expansion team to the Tampa Bay area, and some academics (including this author). The hearings revealed public opposition by Major League Baseball and the National Association of Professional Baseball Leagues (minor league baseball). n77 Major League Baseball owners then conducted a well-publicized flirtation with Senate Majority Leader George Mitchell, raising the possibility of his becoming Commissioner of Baseball, following his decision not to seek re-election. n78 Finally, unable to persuade the committee to even seriously consider this bill, the Senate sponsor proposed narrower legislation strongly pushed by the players' union to eliminate the exemption for labor issues. Baseball owners strongly objected to interfering with pending labor negotiations. Although the legislation was supported at this juncture the AFL-CIO, the Consumer

Federation of America, [*187] as well as five of the eight Republican members of the Senate Judiciary Committee, the bill was resoundingly defeated, garnering only two Democratic votes. (When was the last time that Strom Thurmond and Orrin Hatch voted in favor of a bill supported by labor and consumer groups, only to see it defeated by the likes of Edward Kennedy and Joseph Biden?).

The inability of consumer groups to lobby effectively for broad-based legislation is reflected by the Judiciary Committee's willingness to consider legislation only when it aided the one active group with the financial ability to support a lobbying effort--the players. In stark contrast to clear congressional support for the reserve clause contained in the post-Toolson legislative record cited in *Flood*, legislative developments since *Flood* do not reflect any such endorsement of any of Major League Baseball's current practices. Rather, many of the Senators who voted against the legislation criticized Major League Baseball, but felt that the matter needed further study, not wanting to interfere in a pending labor matter, or hoping to curry favor with Major League Baseball to secure an expansion franchise for their state. n79

On the House side, although a majority of the Judiciary Committee joined a report sharply critical of baseball's antitrust-exempt status, n80 they nonetheless chose to favorably report scaledown legislation that gave the players' union the right to file an antitrust challenge against a salary cap as a means of dealing with the current strike. n81 However, even though an impending congressional adjournment prompted sponsors to take no further action [*188] on the bill, n82 the Committee emphasized that, by reporting this narrow bill, it "is in no way endorsing the view that the exemption extends beyond the facts of Federal Baseball." Indeed, the majority concluded that the record compiled before the Committee suggested "a strong agreement for sweeping, if not total, repeal." n83

In short, while a case can be made that congressional failure to overturn *Toolson* was based on a legislative consensus that the reserve clause challenged in *Flood* should be maintained, there is no evidence that a similar legislative consensus has existed since *Flood* about any current baseball practice. Therefore, just as *Flood* was not decided simply as a matter of stare decisis and legislative inaction, neither should any litigation that might be brought today.

Similarly, the language in *Flood* expressing preference for a legislative solution should not be read as adopting a blanket rule that no precedent should be overturned. n84 Eskridge correctly observes that, three years after *Flood*, a unanimous Court explicitly noted in *United States v. Reliable Transfer Co.* that it has "not hesitated to overrule an earlier decision and settle a matter of continuing concern, even though relief might have been obtained by legislation." n85 Rather than seeing *Reliable Transfer* as a rejection of *Flood*, the two opinions are reconciled if Justice Blackmun's opinion is not read to suggest that any statutory precedent was best left for legislative resolution, but rather that the precise issue in *Flood*--baseball owners' liability under the antitrust laws for agreeing on their player reserve system--was best left for legislative resolution. As discussed in Part I, Blackmun was of the view (pressed on the Court by baseball owners) that the Sherman Act would render the reserve system per se illegal. Yet, as the Court noted, virtually everyone agreed that some types of restrictions were essential for the game. Thus, the Court perceived that a legislative solution was necessary in this specific context in order to ensure that necessary restrictions would be lawful. n86 [*189]

B

Even Eskridge concedes that a "plausible" way to reconcile *Flood* with cases where the Court has overruled precedent is the presence of strong reliance arguments in *Flood*. n87 Justice Blackmun noted that a key aspect of the Court's prior holding in *Toolson* was that baseball had "been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation," n88 and he emphasized that "since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action." n89 Justice Blackmun's meaning is not entirely transparent. However, if we accept, as the Court apparently did, the respondents' arguments about why the reserve system was essential to baseball, we can see why the Court concluded that the reliance interests were indeed significant.

In their brief before the Court, the respondents made two forceful arguments in defense of the reserve system. First, they alleged that "without the balance provided by the reserve system, the clubs with greater financial resources would attract the most outstanding players" and, as a result, "successful and reasonably balanced league play [would be] impossible to maintain." n90 Second, they argued that "the employment continuity provided by the reserve system is necessary to protect, and provide incentive for, the clubs' extraordinarily high player development costs." n91 Although, as noted above, these claims have not withstood the test of time, n92 a judge who believed them might reasonably have concluded that more was at stake than the fact that a group of wealthy individuals had invested money

in an unregulated monopoly in hopes that it would continue to remain so. These claims suggested that the entire structure of baseball was built on the assumption that the reserve system would continue to exist and that major modifications would be required were the reserve system to be significantly modified. While clearly an individual, who pays a premium to purchase a company that enjoys an antitrust exemption, should not be able to rely on its perpetual existence, n93 baseball owners might still have had a plausible reliance argument even if everyone who had purchased a team since Toolson had explicitly confessed that they were aware of the risk that the sport would lose its exemption. The legitimate reliance claim in Flood was not the ability to continue to monopolize, but rather, on the fact that the way in which the sport was organized would have been different had there been no exemption. Thus, many observers were surprised to find that the free agency sought by Curt Flood did not lead to competitive imbalance and the ruin of the "National Pastime" in the years following the demise of the reserve system. n94 Even those who still maintain that Major League Baseball is headed toward fiscal ruin are not of the 1972 view that any significant modification in the reserve system would ruin baseball. n95

Of course, private reliance interests should not be elevated to [*191] such importance that they subordinate major public values: the courts should not have tolerated racial apartheid because many white people came to rely on it to their advantage. But here, unlike the foregoing analogy, the baseball owners' reliance interests were consistent with the Court's view of public values--preserving baseball as we know it as our "National Pastime." n96 As the following part demonstrates, though, public values now point in favor of applying the antitrust laws to baseball.

III

The most recent decision to squarely address the interplay between legislative inaction and stare decisis is the Court's 1989 opinion in *Patterson v. McLean Credit Union*. n97 In *Patterson*, the Court reaffirmed a 1976 decision holding that a post-Civil War statute applied to certain types of private, as well as governmental, race discrimination. All nine Justices agreed that they would reconsider a precedent, even though Congress had not acted, if "the intervening development of the law" had "removed or weakened" the prior decision's "conceptual underpinnings," n98 or if experience had shown that the prior decision was "inconsistent with the sense of justice or with social welfare." n99 The *Patterson* Court was sharply divided on whether to attach significance to congressional failure to overrule a precedent in cases where Congress had actively reviewed the entire subject matter and had passed other legislation based on the assumption of the precedent's validity. However, even those willing to attach more weight to such legislative inaction demanded "something more than mere congressional silence and passivity." n100 Applying *Patterson*'s standards today, the Court should conclude that Flood's conceptual underpinnings have [*192] been removed, that maintaining baseball's antitrust-exempt status is contrary to social welfare, and that the congressional record since Flood reveals nothing more than silence and passivity.

Patterson, moreover, was not the first word on stare decisis. Applying an earlier approach, Justice Louis D. Brandeis' oft-cited dissent in *Burnet v. Colorado Coal Co.* n101 leads to the same conclusion. Brandeis insightfully distinguished between adherence to a rule of law and to the necessarily contextual application of that rule of law to particular controversies. His framework calls for Flood's reconsideration, for it suggests that whatever the merits of the legal principle that baseball's unique characteristics and needs are exempt from antitrust scrutiny, the practices that Major League Baseball engages in today that would run afoul of the Sherman Act are neither unique nor necessary.

A

Justice Kennedy's majority opinion in *Patterson* noted that the "primary reason" for overruling a precedent is that "the intervening development of the law" has "removed or weakened the conceptual underpinnings from the prior decision." n102 This factor fully supports this Article's thesis that Flood was arguably correct in 1972 but should be overruled today. It was certainly true that, in 1972, the conceptual underpinning of Federal Baseball, the original baseball exemption case, had been "removed or weakened." Federal Baseball's holding that baseball exhibitions were not interstate commerce was based on a view of interstate commerce that was clearly reversed by the post-New Deal Court, n103 as Justice Blackmun acknowledged Flood. n104 However, the most recent precedent dealing with the baseball exemption--the Court's 1953 decision in *Toolson*--provided new conceptual underpinnings: a concern about owners' reliance interests and a preference for a legislative solution. Between the years 1953 and 1972, there was no change in Major League Baseball's stance that the entire system of player development relied on the owners' ability to continue to agree on the reserve system, and that applying the antitrust laws to the reserve system would be so harsh that a legislative compro- [*193] mise was the only appropriate solution. n105

The last twenty-two years, however, have demonstrated what the fifties and sixties did not--that Flood's concerns were unfounded. Three years after Flood, a grievance arbitration interpreting the standard player contract gave players

the same relief that Curt Flood had sought under the Sherman Act. n106 The owners and the players' union responded by reaching a collective bargaining agreement--which would, were baseball subject to the Sherman Act, be exempted from antitrust scrutiny under the labor exemption. n107 Under this agreement, the reserve clause was substantially modified, n108 attendance at baseball games rose significantly, n109 and the value of baseball franchises has skyrocketed. n110

By contrast, the reliance interests that the Supreme Court has recently found sufficiently weighty to justify adherence to a prior precedent are qualitatively distinct from those baseball owners would raise today. Claimants who have successfully asserted reliance-based arguments have demonstrated not only that overruling the precedent in question would adversely affect them, but also that, had they known of the ultimate demise of the precedent, they would have ordered their affairs differently so as to avoid or mitigate harm. For example, the Court adhered to a precedent that immunized mail order houses from certain tax liability based in part on the fact that many firms had organized their business operations in reliance on this immunity. n111 The Court also reaffirmed an earlier decision subjecting state-owned railways to employer liability under a federal statute because many states had excluded employees from their own worker compensation statutes on the as- [*194] sumption that the federal statute provided adequate protection. n112 Additionally, the Federal Energy Regulatory Commission's power to exclusively determine stream flows at federally regulated hydroelectric plants was reaffirmed in part because a comprehensive regulatory structure had been erected based on federal preemption. n113

In contrast, the principal adverse effect that antitrust scrutiny would have today on baseball owners would be that they would no longer enjoy the benefits of anticompetitive practices that might well be deemed illegal under the Sherman Act. n114 To illustrate, consider how baseball reacted owners would have during the past decade had it known that, in 1995, it would lose its antitrust exemption. Other than racing to maximize their ability to exploit their monopoly power before legal constraints took effect, it is difficult to see how baseball owners would have structured player relationships, television rights arrangements, or franchise locations differently. Moreover, as noted in Part I, antitrust law, as it has evolved since 1972, would permit the desirable aspects of baseball [*195] to continue to exist. n115 It is difficult to imagine how greater changes in the legal standards governing baseball practices, or in the economic realities concerning these practices, could have occurred since Flood without a removing or weakening the decision's conceptual underpinnings.

B

Significantly, Patterson also held that a precedent can justifiably be overturned when it "becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.' " n116 This criterion explains the result in both Toolson and Flood. In *Radovich v. National Football League*, n117 the Court observed that Toolson continued baseball's antitrust exemption "because it was concluded that more harm would be done in overruling Federal Baseball than in upholding a ruling which at best was of dubious validity." Justice Blackmun cited this explanation in Flood, n118 and, as Part I of this Article makes clear, the Flood majority clearly believed that more harm would be done to the National Pastime by overruling Toolson than by preserving it.

This explicitly normative criterion is a proper factor for courts to consider in determining whether to overrule statutory precedents. If Congress acted with complete information and unlimited time, and followed a procedure that inevitably enabled the majority to assert its will, one could plausibly argue that statutory precedents should never be overruled because Congress would have overturned any decisions with which it disagreed as a matter of social policy. Because none of these assumptions accurately describe the legislative process, however, judges must necessarily make interstitial discretionary judgments about statutory precedents. The Court has not and should not enforce a rule of strict stare decisis if a prior decision was based on outmoded reasoning and there is no reason to believe that the legislature supports the status quo; doing so would be inimical to the public interest in all cases and, in many, would force Congress to divert its attention from more important business to clean up judicial errors. On the [*196] other hand, where a result remains consistent with social welfare, there is no reason to overrule a precedent simply because sterile legal analysis suggests it was incorrectly decided.

Whether or not, in the context of today's social problems, it offends the Court's sense of justice for baseball owners to use their monopoly power to suppress potential rivals, monopolize the player market, and exploit localities, Major League Baseball's monopoly is clearly inconsistent with social welfare. Allowed to freely collude and monopolize, baseball owners have cost taxpayers millions of dollars in stadium subsidies, deprived millions of fans in "have-not" cities of major league franchises, adopted player restraints that result in less competitive pennant races, permitted rampant incompetence by management not checked by forces of competition, and forced fans to pay for cablecasts of

games they used to be able to view for free. n119 There is no reason to think that the adverse consequences flowing from baseball's monopoly status will not continue to be felt by fans across the country. In contrast, as detailed below, subjecting baseball to antitrust scrutiny will force owners to compete. In the process, several things will occur: (1) owners will realize that undue restrictions on competition for players will result in treble damage liability and that players will be able to sue rather than strike to prevent these restrictions; (2) Major League Baseball can be expected to expand to a few lucrative new markets, creating thrills for millions of new fans and reducing the existing owners' ability to threaten their current communities with relocation; and (3) fans will be able to challenge efforts to charge them to watch broadcasts of games now available for free.

A leading antitrust/sports scholar, Professor Gary Roberts, demurs to this rosy view. He believes that recent cases applying the antitrust laws to other professional sports leagues have been "inconsistent, often unjustifiable, and generally counterproductive." n120 Careful analysis of the antitrust challenges that could potentially be made if baseball no longer enjoyed an antitrust exemption suggests, however, that the methodology set forth in the Supreme Court's only recent opinion concerning league sports--*NCAA v. Oklahoma Regents*-- would both preserve the desirable practices now employed by Major League Baseball and promote consumer/ fan interests by barring anticompetitive agreements in a manner [*197] that was consistent, justifiable, and productive for fans and taxpayers.

In the spring of 1993, Roberts asserted that he could not "imagine that players or consumers would be any better off today with respect to the labor market if the antitrust exclusion were abolished." n121 However, as this Article was being written in the winter of 1995, a baseball strike was upon us, because the owners unilaterally agreed to a salary cap. It is clear that both players and consumers would have been better off if the players had the option of using the judicial system, rather than a work stoppage, to attack the salary cap. Giving football players the opportunity to convince a jury that the NFL's player restraints violated the Sherman Act avoided work stoppages and brought labor peace to that sport. Although a detailed examination of the legality of a salary cap is beyond the scope of this article, n122 it would appear that the salary cap proposed by the baseball owners n123 is of doubtful legality. By effectively limiting each team's payroll to 110 per cent of the league average, the cap prevents teams with inferior records from quickly improving in order to restore fan support. To date, courts have cited the need to maintain a competitive balance as the only justification for trade restrictions involving other sports, n124 and the proposed baseball salary cap seems to fail to meet that standard.

The most significant area of Roberts' critique concerns franchise relocation and expansion practices. Roberts claims that the Sherman Act is ill-suited to deal with the competitive problems raised by these practices. n125 Specifically, he is critical of [*198] the Rule of Reason standard generally applied by courts in Sherman Act cases when evaluating restrictions imposed by members of a sports league. This standard required that owners justify significant restraints of trade by showing such restraints are reasonably necessary to achieve some procompetitive goal. n126 Unlike the National Football League, which is organized as a single joint venture, however, Major League Baseball is organized as two leagues. A court analyzing the legality of Major League Baseball's expansion and relocation practices would likely focus first on the reasonableness of the provision in the Major League Agreement requiring that American League owners approve any expansion or relocation by a National League team and vice versa. n127 This inquiry would likely lead to a finding that this provision was unnecessary and anticompetitive. As detailed elsewhere, n128 if the leagues were required to make decisions about franchise location independently, consumers would benefit from greater expansion and taxpayers would benefit from the significant reduction in the teams' ability to extort tax subsidies through threats of relocation. Thus, Roberts' concerns about the courts' ability to determine when the antitrust laws would permit owners of a single league to expand or permit relocation are not applicable to Major League Baseball. This is particularly true in light of the Supreme Court's suggestion that the antitrust laws extend considerable latitude to intra-league decisions concerning these matters if the league were in competition with another league in the same sport. n129 [*199]

Thus, while fans would benefit if the American and National Leagues were required by law to compete for new expansion sites, each league could refuse to allow its existing franchises to relocate. For example, it would be very difficult to show that the National League's refusal to permit the Cincinnati Reds or the San Diego Padres to move to Buffalo lessened competition when Buffalo could persuade the American League to move or start a franchise there. Absent collusion, if Buffalo could not lure either league, it would be hard to argue that the absence of a team there was the result of a restraint of trade.

Finally, Roberts makes no serious claim that the Sherman Act would adversely affect Major League Baseball's legitimate interests in the sale of broadcast rights. Indeed, he concedes that these arrangements are not within the scope of the Flood exemption as it stands today. n130

Two other myths about baseball and antitrust, not discussed by Roberts, also deserve mention. One is that the modest expansion that would occur were the National and American Leagues to stop colluding is bad for fans generally because the overall talent in baseball would become too diluted. While some baseball purists [*200] who currently reside in Major League cities may perceive that expansion would diminish the quality of their entertainment, the short answer, as demonstrated by the fans' reaction in Florida and throughout the Rocky Mountain area to the new Marlins and Rockies franchises, is that the dramatic increase in satisfaction in the new areas dwarfs any decreased satisfaction among the rest of us. n131

A second myth is that the higher salaries paid to players in a more competitive environment lead to higher ticket prices for fans. The economics of ticket sales demonstrates that this is false. Because the number of tickets available for a season is fixed, each franchise selects the price that will create the most ticket revenue. Some franchises opt for near sell-outs at lower prices; others prefer to charge higher prices, even though fewer tickets are sold. This choice would be the same if every team's payroll were halved or doubled overnight: the team would still prefer to make more money, rather than less, on ticket prices. n132

In sum, the methodology of the Patterson majority, unchallenged by the concurring minority, recognizes that stare decisis does not require adhering to a precedent shown to by experience to be inconsistent with social welfare. The past twenty-plus years of [*201] monopolistic exploitation of fans, taxpayers, as well as players, provides additional support for Flood's reconsideration.

C

A bare majority of the current Justices appear to be strongly opposed to placing any reliance on congressional inaction to justify adherence to precedent n133 --an opposition that, of course, would make it even easier to reconsider Flood. Although other justices have been more willing to infer that from some forms of legislative inaction signal congressional approval of judicial precedents, the legislative reaction to Flood does not justify its continued vitality even under this more relaxed standard. A previous majority of the Court recognized that the legislative record "may be probative to varying degrees" even if "inaction may not always provide crystalline revelation." n134 In a separate opinion in Patterson, Justice Brennan argued that "evidence of congressional acquiescence that is 'something other than mere congressional silence and passivity' " may provide "more positive signs of Congress' views." n135

A comparison of the legislative records found probative by Justices in this camp, with the legislative reaction since Flood, makes it clear that the latter fails to contain "more positive signs of Congress' view," but, rather, consists of "mere congressional silence and passivity" from which all Justices agree that nothing can be inferred. For example, these Justices attached significant weight to the absence of congressional efforts to amend Title VII after the Court upheld voluntary affirmative action by private employers, n136 emphasizing that Congress "had not hesitated" to pass corrective legislation in the past when it disagreed with the Court's interpretation of Title VII. "Surely," Justice Brennan concluded, "it is appropriate to find some probative value in such radically different congressional reactions to this Court's interpretations of the same statute." n137 In contrast, Congress has enacted no legislation in the [*202] sports antitrust area since Flood.

Similarly, in Patterson itself, Justice Brennan argued that stare decisis was appropriate because Congress had explicitly rejected an amendment that would have had the same effect as the overruling the Court's earlier precedent. He also pointed to the subsequent legislation whose legislative history showed that Congress had assumed validity of that precedent. n138 Likewise, Flood inferred that Congress supported its prior decision in Toolson, noting that Congress had rejected efforts to subject the reserve system to antitrust scrutiny because of specific congressional concerns that the reserve system be preserved. However, the legislative record relied upon in Flood related to an issue that is no longer relevant to likely antitrust challenges to Major League Baseball's practices--decisions about expansion and relocation, the sale television broadcasting rights, and efforts by the owners to impose a salary cap on players. Unlike Patterson, there has been no explicit congressional rejection of proposals to overrule or modify Flood to prohibit these practices, n139 and no legislation that assumed Flood's continuing validity.

The fear that Major League Baseball would abuse its power concerning in making expansion and relocation decisions was one of the reasons why Congress chose not to codify baseball's antitrust exemption in 1952. n140 While Flood painted a picture of legislative consensus on the desirability of maintaining the reserve sys- [*203] tem, even if other concerns about antitrust and sports leagues precluded agreement on actual legislation, there has been no postFlood consensus on Major League Baseball's expansion and relocation policies. Legislators who have recently advocated continued or increased antitrust protection for sports leagues in order to prevent franchise shifts have been unable to pass legislation precisely because of opposition from others who, like their 1952 predecessors, refused to give owners

unfettered power over franchise expansion and relocation. n141 As to television restraints, Congress has spoken directly to this issue, providing a limited statutory exemption to all sports, including baseball. n142 This strongly indicates that there is no congressional interest in providing a greater non-statutory immunity. The salary cap is a new form of trade restraint about which Congress has been entirely silent. Thus, Congress has not, through "positive inaction" or otherwise, evinced any desire to protect extend antitrust immunity to Major League Baseball's decisions concerning franchise location, broadcast rights, or salary caps. n143

In sum, the majority in *Patterson* consider it "impossible to assert with any degree of assurance" that congressional failure to [*204] act represents affirmative congressional approval of any given precedent. n144 Under that approach, the legislative history relied upon in *Flood* would not justify adherence to the preemption even if it suggested continued congressional support for baseball's antitrust exemption. But even under the approach adopted by Justice Blackmun in *Flood* and by Justice Brennan in *Patterson*, the legislative record since *Flood* provides no basis whatsoever for inferring congressional endorsement of trade restraints involving franchise relocation decisions, broadcast rights sales, or salary caps.

D

Finally, the conclusion that *Flood* should be reconsidered today is supported by Justice Louis Brandeis' sage insights on the role of *stare decisis* as set forth in his oft-cited dissenting opinion in *Burnet v. Coronado Oil & Gas Co.* n145 In that opinion, Brandeis distinguished between precedents that interpret a text n146 and precedents that apply a text to a given set of facts, and argued that *stare decisis* considerations should not be given great weight in the latter category of cases. The issue in *Burnet* did not really require the Court to interpret the Constitution, but simply to apply an accepted Constitutional principle (that the federal tax laws may not interfere substantially with state functions) to the particulars of the case. n147 Thus, Brandeis argued that an earlier decision holding that a certain federal tax impermissibly interfered with state functions may well have "been influenced by prevailing views as to economic or social policy which have since been abandoned," n148 and therefore should not limit the then-current Justices' ability to bring their opinions "into agreement with experience and with facts newly ascertained." n149 [*205]

Applying Brandeis' framework, the Court could adhere to *Flood*'s holding that baseball's "unique characteristics and needs" are exempt from the antitrust laws, but should permit "experience" and "facts newly ascertained" to inform its view as to what, in 1995, falls into that category. This author suggests that little remains. Experience with litigation with challenging rules that restrict players' mobility in other professional sports leagues suggests that antitrust scrutiny can promote competition without endangering a sport, and there is no evidence that baseball's characteristics or needs differ significantly in this regard from football, basketball, or hockey. The same is true for restraints on the sale of television rights and decisions concerning franchise expansion and relocation. Giving a fresh look, advocated by Brandeis, to baseball's "unique characteristics and needs" would result in antitrust scrutiny for most, if not all, of Major League Baseball's practices. n150

As Justice Blackmun takes his retirement, with the accompanying retrospectives on his judicial career, and as baseball muddles through yet another labor dispute, it seems appropriate to reflect on what *Flood v. Kuhn* meant in 1972 and means today. *Flood* has been severely criticized, both for the result that baseball owners enjoy a unique exemption from antitrust liability, and for its allegedly formalist reasoning, based on a strict adherence to precedent and a politically naive understanding of the significance of Congress' failure to act to modify or overturn prior Court decisions concerning baseball and antitrust. This sort of criticism is not of the sort normally directed at Justice Blackmun. Rethinking the structure and reasoning of *Flood* reveals a decision grounded in Justice Blackmun's view that more harm than good would come from subjecting baseball to antitrust, and his perception that Congress had specifically indicated their support for the precise practice challenged by the plaintiff. This reasoning--based on the facts and people involved, and recognizing the evolutionary nature of judicial decisionmaking--seems more typical of Justice Blackmun's jurisprudence. When viewed in this light, *Flood* was more defensible in 1972. However, once *Flood* is no longer viewed in formal or abstract terms, it becomes clear that there are no congressional signals pointing in the other direction, and that more good than harm would come from overruling the decision and requiring baseball owners to operate under the same laws as everyone else. n151

n1 Murray Chass, A Decision: No New Commissioner, N.Y. TIMES, Jan. 20, 1994, Sec. B, at 15.

n2 *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993); *Butterworth v. National League*, No. 82,287 (Fla. 1994). Baseball owners reached a monetary settlement with the Piazza plaintiffs; in *Butterworth*, the Florida Supreme Court held that baseball's exemption would be narrowly construed and did not immunize the National League from the Florida Attorney General's antitrust investigation, which is apparently closed.

In addition, a class action has recently been filed on behalf of businesses located near baseball stadia, season-ticket holders and fans, asserting Sherman Act challenges to a host of practices by Major League Baseball. *McCoy v. Major League Baseball*, No. C95-0383R (W.D. Wash).

n3 See Baseball Antitrust Immunity: Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights, Senate Comm. on the Judiciary, 102d Cong., 2d Sess. 33 (Serial No. J-102-90) (1992) (hereafter *Metzenbaum Hearings*).

n4 See, e.g., John Kass & Daniel Egler, Sox Will Stay if Legislature OKs Proposal, CHICAGO TRIB., May 12, 1988, Part I, at 1; Giants OK Deal to Leave -- League to Vote on Sale to Florida Group, SAN FRANCISCO CHRON., Aug. 8, 1992, at A1 (San Francisco Giants owner, disenchanted with current stadium and voter refusal to subsidize a new one, shopping team around to any buyer, with no regard for keeping team in the area); Stefan Fatsis, Seven Strikes and Still Swinging: St. Petersburg Still Hopes to Get a Major-League Team, CLEVELAND PLAIN-DEALER, July 14, 1993, at 5F (detailing emergence of local buyers to prevent relocation to Tampa of teams in Oakland, Minnesota, and Dallas-Fort Worth).

Tax subsidies and favorable stadium deals have replaced local media revenues as the most important factor in franchise value and profitability, allowing mid-size market clubs such as the Texas Rangers, Baltimore Orioles, and Cleveland Indians to earn above-average incomes. Michael K. Oznian and Brooke Grabarek, Foul!, FIN. WORLD, Sept. 1, 1994, at 1820.

Of course, baseball's acting Commissioner, Milwaukee Brewers' owner Bud Selig, would never threaten to move to Tampa for such exploitive purposes. Rather, if sufficient tax subsidies were not forthcoming in Wisconsin for the Brewers, Selig threatened to move to Phoenix or Charlotte! Andrew Zimbalist, Baseball Economics and Antitrust Immunity, 4 SETON HALL J. SPORT L. 297, 303 (1994).

n5 407 U.S. 258 (1972).

n6 Compare Robert G. Berger, After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws, 45 U. PITT. L. REV. 209 (1983), with Brooks Hearings, supra note *, at 77 (Statement of Prof. Gary Roberts). See also Gary R. Roberts, Sports League Restraints on the Labor Market: The Failure of Stare Decisis, 47 U. PITT. L. REV. 337, 340 n.7 (1986) ("for all practical purposes, baseball is constrained in essentially the same way as all sports leagues would be if properly treated as single firms for section 1 purposes").

n7 Compare Lawrence A. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 MICH. L. REV. 177, 229 (1989), with William N. Eskridge, Jr., Overruling Statutory Precedents, 76 GEO. L.J. 1361 (1988); and William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 MICH. L. REV. 67, 106 (1987). See also Berger, supra note 6, at 209; and C. Paul Rogers III, Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws, 14 HOUSTON L. REV. 611, 622 (1977).

n8 A host of commentators have read *Flood* as refusing to overturn prior precedent because of stare decisis, or simply because Congress had failed to pass corrective legislation. See, e.g., Martin H. Redish & Shane V. Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 DUKE L.J. 569, 589 n.112; Robert A. McCormick, Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball, 35 VAND. L. REV. 1131, 1149 (1982); Lee Goldman, Sports, Antitrust, and the Single Entity Theory, 63 TUL. L. REV. 751, 752 n.2 (1989); A. Michael Froomkin, Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process, 66 TEXAS L. REV. 1071, 1084 n.80 (1988) (book review).

n9 *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 84 (1984).

n10 Stephen F. Ross, Monopoly Sports Leagues, 73 MINN. L. REV. 643 (1989) (hereafter *Monopoly Sports Leagues*); Brooks Hearings, supra note *.

n11 John A. Jenkins, A Candid Talk with Justice Blackmun, N.Y. TIMES, Feb. 20, 1983, at 20; William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479, 1492 (1987); Note, The Changing Social Vision of Justice Blackmun, 96 HARV. L. REV. 717, 734 (1983).

n12 407 U.S. at 283.

n13 See Harold Hongju Koh, Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens, 8 HAMLINE L. REV. 51, 52 (1985).

n14 The reserve system challenged in Flood included an agreement among all baseball owners to use a uniform player contract that confined players to the club with which they had previously contracted and gave the club the unilateral right to renew the contract each year. 407 U.S. at 259 n.1.

n15 Entitled "The Game," Part I provides a brief summary of baseball history, including the famous list of the "many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season." It also quotes from several well-known poems about baseball and concludes by referring to baseball as either a "national pastime" or, citing George Bernard Shaw, "the great American tragedy." *Id.* at 260-64.

n16 BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 190 (1979).

n17 Calling Part I a "trace of resistance to the hyperrationality of contemporary legal discourse," one commentator recognized that Blackmun was trying to "evoke the mysterious, inexplicable hold that baseball has on the core of American culture" in order to justify "his -- in the best sense -- deeply conservative impulse not to tamper with the traditional social order of the game." Paul Campos, Silence and the Word, 64 U. COLO. L. REV. 1139, 1142 (1993). See also Edward B. Rock, Antitrust and the Market for Corporate Control, 77 CAL. L. REV. 1367, 1389 (1989) (baseball continues to enjoy an exemption from the otherwise broad scope of the Sherman Act "for reasons mysterious only to those ignorant of baseball's grip on the national psyche").

n18 259 U.S. 200 (1922)[hereinafter Federal Baseball].

n19 Flood, 407 U.S. at 271 n.10 (quoting HAROLD SEYMOUR, BASEBALL: THE EARLY YEARS 420 (1971)).

n20 *Id.* at 272-73 (quoting Report on the Subcomm. on Study of Monopoly Power of the House Comm. on the Judiciary, H.R. Rep. No. 2002, 82d Cong., 2d Sess. 229 (1952) (hereafter "1952 House Report")).

n21 *Id.* at 269 n.9 (quoting Flood v. Kuhn, 443 F.2d 264, 272 (2d Cir. 1971)) (emphasis added).

n22 346 U.S. 356 (1953)[hereinafter Toolson].

n23 Flood, 407 U.S. at 274 (quoting Thomas Reed Powell's Brief for Boston American League Base Ball Co. as Amicus Curiae, Toolson v. New York Yankees, No. 18 (O.T. 1953) at 2).

n24 *Id.* at 268 (citing 316 F. Supp. at 275-76).

n25 Brief for Respondents at 5-14, Flood v. Kuhn, No. 71-32 (O.T. 1971)[hereinafter Flood Respondents' Brief].

n26 352 U.S. 445, 450 (1957).

n27 Flood thus differs remarkably in both tone and content from Toolson and Radovich. The former was a terse per curiam opinion, which asserted in conclusory fashion that (1) Congress' inaction was dispositive evidence of its endorsement of the antitrust exemption adopted in Federal Baseball; (2) strong reliance interests precluded reconsideration of the exemption; and (3) any social welfare evils caused by the exemption should be remedied by new legislation. See 346 U.S. at 357. Radovich involved a practice far less defensible than the reserve clause--the blacklisting of players who had "jumped" to a rival football league--and neither the majority nor the dissenting Justices engaged in any discussion of the degree to which player restraints like the reserve clause might be essential for the success of the National Football League.

n28 LIONEL S. SOBEL, PROFESSIONAL SPORTS AND THE LAW 1 (1976) (citing 1952 House Report, *supra* note 20, at 16-50). For a later and contrary view, arguing that the failure of sustained competition within baseball is due to the owners' monopolistic practices, not to the inherent unworkability of competition, see Monopoly Sports Leagues, *supra* note 10, at 718-21.

n29 See *ENCYCLOPEDIA OF FOOTBALL* 12-6 to 12-7 (3d ed. 1963) (Harold Claassen & Steve Boda, Jr., eds.).

n30 Indeed, Baseball Commissioner Bowie Kuhn explicitly attributed the end of the Yankees' dominance to the draft. He noted that prior to the draft the Yankees had won 11 of 13 pennants because of their ability "to sign most of the more promising youngsters because of their reputation, tradition and location." Hearings on H.R. 1206, et al., Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 92d Cong., 2d Sess. 194-95 (1972).

n31 See *Monopoly Sports Leagues*, supra note 10, at 671-84 (1989) (citing author's research and other studies).

The new era of free agency was the result of a new collective bargaining agreement entered into following the arbitration decision in the Messersmith case, discussed, *infra*, at notes 96, 106.

n32 *Flood Respondents' Brief*, supra note 25, at 43.

Although most of the "extensive commentary" cited by the Court concerning this issue, 407 U.S. at 280-81 n.16, did not address the applicable antitrust standard that would be used were baseball subject to the Sherman Act, the articles that did discuss the issue almost all supported the respondents' substantive policy contentions about the need for a reserve clause and/or the inability of current antitrust doctrine to accommodate that need. See, e.g., Richard B. Blackwell, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859, 861, 870-72 (1971); Note, *The Super Bowl and the Sherman Act: Professional Sports Teams and the Anti-Trust Laws*, 81 HARV. L. REV. 418, 421 (1967); Note, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 586-88, 623-24, 627 (1953); John Eckler, *Baseball -Sport or Commerce?*, 17 U. CHI. L. REV. 56, 72-76 (1949).

n33 405 U.S. 596 (1972).

n34 *United States v. Topco Assoc.*, 319 F. Supp. 1031, 1040 (N.D.Ill. 1970), rev'd, 405 U.S. 596 (1972).

n35 407 U.S. at 294-96. Justice Blackmun responded that his opinion made "it unnecessary for us to consider" the points made in Marshall's dissent. *Id.* at 285. Combined with the various policy arguments in favor of the reserve clause, this omission suggests that the majority opinion is not simply a preference that Flood's challenge be resolved through the process of collective bargaining rather than antitrust litigation.

n36 405 U.S. at 613-14. Although the Flood defendants argued before the trial judge that the rule of reason should govern challenges to baseball practices (an argument which "impressed" the trial judge), see *Flood v. Kuhn*, 309 F. Supp. 793, 801 n.26 (S.D.N.Y. 1970), in the Supreme Court they emphasized the risks of per se illegality.

n37 See *Broadcast Music Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979). The case involved a blanket license sold to television and radio stations, juke box owners, and other users of musical copyrights permitting the use of compositions by thousands of Broadcast Music Inc.'s composer-members. Although these composers were literally rivals who were fixing the price of the product, the Court held that the agreement was not per se illegal because the price fixing was essential in order to market this new, jointly produced license.

n38 468 U.S. 85 (1984)[hereinafter *Oklahoma Regents*].

n39 *Id.* at 101. As examples, the Court noted that members of a league must agree on matters such as the size of the field, the number of players on a team, the extent to which physical violence is to be encouraged and proscribed, and on how to "define the competition to be marketed." *Id.*

n40 See Eleanor Fox & Lawrence Sullivan, *Antitrust-Retrospective and Perspective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 955 (1987).

n41 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

n42 468 U.S. at 102-03.

n43 See *Gardella v. Chandler*, 172 F.2d 402, 415 (2d Cir. 1949) (Frank, J.) (even if reserve clause was essential to baseball's existence, "the public pleasure does not authorize the courts to condone illegality").

n44 *United States Football League v. NFL*, 842 F.2d 1335 (2d Cir. 1988).

n45 *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

n46 *McNeil v. NFL*, 1992-2 Trade Cas. (CCH) 1 69,982 (D. Minn.).

n47 *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667 (7th Cir.), cert. denied, 113 S. Ct. 409 (1992).

n48 *Los Angeles Memorial Coliseum Comm. v. NFL*, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984).

n49 See notes 127-129 *infra* and accompanying text.

n50 See notes 122-124 *infra* and accompanying text.

n51 See, e.g., *NBA Agrees to Let Hartford Cables Telecast Celtics and Knicks Games*, 64 ANTITRUST & TRADE REG. REP. 543 (May 6, 1993).

n52 *McNeil v. NFL*, 1992-2 Trade Cas. (CCH) 1 69,982 (D. Minn.).

n53 *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961).

n54 Compare *Los Angeles Memorial Coliseum Comm. v. NFL*, 726 F.2d 1381 (9th Cir.) (upholding jury verdict that league opposition to relocation of Oakland Raiders to Los Angeles was illegal, based on evidence that restriction would unjustifiably protect Los Angeles Rams from competition), cert. denied, 469 U.S. 990 (1984), with *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 84, 116 & n.55 (1984) (court would look favorably on restrictions imposed by one of several leagues, where justified by desire to compete more effectively with rival league).

n55 See *Broadcast Music Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979) (noting pro-competitive nature of agreement creating unique product).

n56 See Part III-B *infra*.

n57 One commentator observed that Justice Blackmun "has consistently stressed a dynamic, evolutionary view of the judiciary." Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 721 (1983). The most frequently cited example of Blackmun's dynamic interpretation is *United Steelworkers of America v. Weber*, 443 U.S. 193, 209-16 (1979) (concurring opinion), which is based on "considerations, practical and equitable, only partially perceived, if perceived at all, by the enacting Congress"

n58 For example, the teaching of *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), that a "thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," has been criticized on the grounds that "the problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 474 (1989) (Kennedy, J., concurring). On the other hand, judges who purport to decide controversial cases based on their own perception of the "plain meaning" of a statute do not necessarily fare any better. See James Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 889-91 (1930); Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 421-25.

n59 William N. Eskridge, Jr., *Overruling Statutory Precedent*, 76 GEO. L.J. 1361 (1988).

n60 *Id.* at 1380.

n61 Rogers, *supra* note 7, at 622-23. As Dean Rogers notes, the Court had explicitly rejected reliance on legislative inaction on several occasions. See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 119-21 (1940) (cited with approval in Justice Douglas' dissent to *Flood*, 407 U.S. at 287 n.3); *Girouard v. United States*, 328 U.S. 61, 69 (1946).

n62 For a suggestion that judicial candor may not be appropriate for judges engaged in dynamic interpretation, see Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L. J. 353 (1989).

n63 Eskridge, *supra* note 59, at 1381. A list of the many Supreme Court decisions overruling statutory precedents from 1962-1992 can be found in Appendix 2 to WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 316-22 (Harvard Univ. Press 1994).

n64 2 Inquiry into Professional Sports: Hearings Before the House Select Comm. on Professional Sports, 94th Cong., 2d Sess. 476 [hereinafter "Sisk Hearings"] (testimony of Professor Lionel S. Sobel).

n65 In 1958, the House Judiciary Committee favorably reported legislation that would have treated all professional sports leagues equally. The bill applied the antitrust laws to baseball, but exempted rules of all sports that were "reasonably necessary" to achieve goals such as competitive balance. H.R. Rep. No. 1720, 85th Cong., 2d Sess. 2 (1958). The measure was narrowly approved on a 17-15 vote, with the dissenters complaining that the "reasonably

necessary" test created too much confusion and would result in too much litigation. *Id.* at 10, 13. On the House floor, the bill was amended to immunize any agreement that "relates to" matters including achieving competitive balance and the reserve system. 104 Cong. Rec. 12105 (1958). Similar legislation was introduced in the Senate with 52 co-sponsors. See *id.* at 12430-31, 13036, 13316. Later that year, the chair of the Senate's Antitrust and Monopoly Subcommittee, Estes Kefauver, announced that the legislation would remain in committee because of "opposition to the unconditional exemption from the antitrust laws provided in these bills." See PAUL A. PORTER, A REVIEW AND CHRONOLOGICAL SUMMARY OF JUDICIAL AND CONGRESSIONAL ACTIVITY IN THE PAST TWENTY YEARS, reprinted in 2 Sisk Hearings, *supra* note 64, at 432. (Porter served as counsel to Major League Baseball).

In 1965, the Senate passed legislation similar to that which its Antitrust subcommittee had killed seven years earlier. See 111 Cong. Rec. 22329. The Committee Report explained that the exemption for the reserve system was "necessary to maintain competitive equality among the member clubs. . . ." S. Rep. No. 462, 89th Cong., 1st Sess. 13 (1965). This time, the legislation died in the House Judiciary Committee. Porter, *supra*, at 437. Justice Blackmun cited this record in *Flood*. 407 U.S. at 281 and *n.* 17.

In light of Curt Flood's claim that the reserve system unreasonably restrained players, one other piece of legislation, which barely missed passage in the Senate, could also be viewed as supporting Justice Blackmun's thesis that Congress endorsed the reserve system challenged in *Flood*. In 1960, the Senate Judiciary Committee reported, without recommendation, legislation that would have granted broad antitrust exemptions for football, basketball, and hockey, but would have limited the protection afforded to Major League Baseball's reserve system to 40 players, plus 60 other players in their first four years of professional baseball. This provision recognized that, in addition to restraining players, the reserve system restrains rival leagues. Its clear purpose was to facilitate the ability of the new Continental League to begin operations in rivalry with the National and American Leagues. S. Rep. No. 1620, 86th Cong. 2d Sess. 10-11 (1958) (explanation of Sen. Kefauver). When the bill's provisions restricting baseball's reserve system were stricken on a 45-41 vote, the Senate opted to recommit the bill was recommitted to the Judiciary Committee rather than allow passage of legislation broadly exempting all sports from the antitrust laws. 106 Cong. Rec. 14749 (1960). The debate on this legislation suggests that any concerns about the reserve system were limited, and that a broad consensus existed that some form of reserve clause was necessary for baseball.

n66 Eskridge, *supra* note 59, at 1405-06.

n67 *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1452-53 (1994); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

n68 See, e.g., 1952 House Report, *supra* note 20. Indeed, in 1958, the combination of political support on behalf of other professional sports leagues and general support for the reserve system led 52 senators to co-sponsor legislation exempting the reserve systems of all sports from antitrust scrutiny. The bill was killed by a subcommittee chair, suggesting that, if anything, the procedural roadblocks and other factors mentioned by Eskridge worked at that time to prevent passage of an even broader exemption. See, *supra* note 65.

n69 407 U.S. at 283. In a paragraph where he concluded that the congressional response to Federal Baseball and Toolson was "obviously more than mere congressional silence and passivity," Justice Blackmun may not have been as precise as he could have been. In that paragraph, he suggested that the Court's conclusion that "Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes" was based on the fact that "remedial legislation has been introduced repeatedly in Congress but none has ever been enacted." *Id.* However, the entire opinion makes it clear that his judgment about congressional intent was based on far more than the simple fact that the bills that had been introduced had not passed.

It is certainly true that Flood's inference of congressional intent from "positive inaction" is not as strong as the inference that can be drawn in cases where Congress has reviewed a certain subject on which the Court has ruled, changing the law in some areas while leaving the Court's decision untouched. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (Congress passed several bills amending Title VII without overturning *United Steelworkers v. Weber*, 443 U.S. 193 (1979)); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Congress passed legislation affecting IRS' methods of enforcing prior precedent of *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1970), summarily aff'd, 404 U.S. 997 (1971), but explicitly tailoring new provisions so as not to affect substance of *Green*). Indeed, while *Flood* remains cited, see, e.g., *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2213 *n.*5 (1992), the Court has "observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 169 (1989). This explains why Justice Blackmun felt it necessary to enhance the probative value of

congressional inaction by demonstrating at such length the importance of baseball and the disastrous impact that the antitrust laws would have on the sport. See generally James J. Brudney, Legislative History Treatment of Judicial Decisions: Idle Chatter or Congressional Riposte, 93 *MICH. L. REV.* 1 (1994).

Congress passed one statute relating to baseball and antitrust, the Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732 (1961) (codified as amended at 15 *U.S.C. section 1291-95* (Supp. IV 1986)). That statute was explicitly drafted so as to avoid creating any inference about congressional intent concerning the antitrust exemption for baseball. See 15 *U.S.C. section 1294* ("nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act . . . except the agreements to which [this Act] shall apply").

n70 831 *F. Supp.* 420 (*E.D. Pa.* 1993).

n71 *Id.* at 436 (quoting *Flood*, 407 *U.S.* at 273-74) (emphasis changed).

n72 644 *So. 2d* 1021 (*Fla.* 1994)

n73 The Clayton Act authorizes state attorneys general to sue on behalf of natural persons within their states to enforce federal antitrust violations. 15 *U.S.C. section 15C*.

n74 644 *So. 2d* at 1025.

n75 See Brooks Hearings, *supra* note *; Metzenbaum Hearings, *supra* note 3.

n76 Steve Neal, Callahan Steps Up to the Big Leagues, *CHI. SUN-TIMES*, Jan. 28, 1993, at 29; Craig Karmin & David Grann, Baseball Execs Prevail in Campaign Spending, *THE HILL*, Feb. 15, 1995, at 1 ("Major league owners and executives personally gave more than \$ 200,000 to congressional campaigns during the 1993-1994 election cycle, while the 20 highest-paid players, whose combined salaries total more than \$ 94 million, gave nothing, according to Federal Election Commission Records.").

n77 See Brooks Hearings, *supra* note *; Metzenbaum Hearings, *supra* note 3.

n78 Steve Marantz, The Merchant of Dennis, *SPORTING NEWS*, July 4, 1994, at 14.

n79 See, e.g., Donald Kaul, Lust for Loot Will Be Baseball's Downfall, *HOUSTON CHRON.*, July 14, 1994, at 18 (Senator Joseph Biden opts for further study although he admits that the "way in which sports teams are able to hold up the taxpayers without any obligation is close to unconscionable"); Marantz, *supra* note 78 (Arizona Senator Dennis DeConcini explains that he voted against the legislation based on promise to expand to Phoenix); Karl Vick, Baseball Wins One in the Senate, *ST. PETERSBURG TIMES*, June 24, 1994, at 1A (Alabama Senator Howell Heflin seeks to avoid intervention in pending labor dispute).

Author's Note: This article was originally accepted for publication in the fall of 1994. As the article is being printed, the Senate Judiciary Committee has favorably reported (although it had not filed a report on) S. 627. Consistent with the article's prediction, the bill removes the antitrust exemption, but specifically provides that the legislation will not affect the "applicability or nonapplicability of the antitrust laws" to agreements affecting minor league baseball, franchise relocation, or broadcasting. In other words, the only significant restraints likely to be challenged under S. 627 are those lobbying players--the only active group with the financial ability to support a lobbying effort. However, the language quoted above clearly demonstrates that the current Congress simply is unable to reach a consensus concerning other restraints of baseball.

n80 H.R. Rep. No. 871, 103d Cong., 2d Sess. (1994) [hereinafter Brooks Report].

n81 Mark Maske, House Move Could Limit Owners, *WASH. POST*, Sept. 30, 1994, at C1.

n82 *Id.*

n83 Brooks Report, *supra* note 80, at 4.

n84 Eskridge, *supra* note 59, at 1387.

n85 421 *U.S.* 397, 409 *n.15* (1975) (quoting *Burnet*, 285 *U.S.* at 406 *n.1* (Brandeis, J., dissenting)).

n86 This explanation also answers Eskridge's argument that *Flood* stands for the proposition that controversial political decisions are best left to the legislature. Eskridge, *supra* note 59, at 1407-08.

n87 Eskridge, *supra* note 59, at 1382.

n88 407 U.S. at 273 (quoting *Toolson*, 346 U.S. at 357).

n89 *Id.* at 283. Although the quote does not refer specifically to the reserve system, this practice is the only one Justice Blackmun discusses, and two sentences later he expressly notes that the Court "has concuded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes." *Id.* (emphasis added).

n90 Flood Respondents' Brief, *supra* note 25, at 7.

n91 *Id.* at 9.

n92 See text accompanying note 31 *supra*. Although there has been no significant change to date in the minor league farm system approach to player development (each club operates approximately six minor league teams to develop its own players), this is arguably due to the collective bargaining agreements with the Major League Baseball Players Association, which limit free agency players with six years of service. The willingness of the players' union to agree to this limitation was, of course, unknown when Flood was decided.

n93 See William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 *MICH. L. REV.* 67, 123 (1987):

If a narrow, well-organized group wins a favorable interpretation -- perhaps by fortuity, perhaps by sheer perseverance -- from the courts, an agency, or the executive, and then builds its own reliance interests and trumpets it to Congress, should the courts or agency not be able to change its mind later, when problems with the interpretation become manifest?

n94 A variety of factors may explain why free agency did not cause massive competitive imbalance in baseball. The most important may be the difficulty in predicting which free agents will really build champions, and the natural inclination of inferior teams to spend more and take greater risks in order to improve. For a thorough discussion, see ANDREW ZIMBALIST, *BASEBALL AND BILLIONS* ch. 4 (1992).

n95 Curt Flood did challenge Major League Baseball's argument that the reserve clause was necessary and that the owners' reliance interests were significant, Brief for Petitioner, *Flood v. Kuhn*, at 24-29 (No. 71-32), but one can see why his brief did not persuade a Court wary of taking a risk that its decision might damage our "National Pastime." First, he argued that the Court should not allow "businessmen to rely, for generations, upon palpably erroneous interpretations of the Sherman Act at the expense of the public policy in favor of competition." *Id.* at 24. But the Court's view of public policy (both its own and that it attributed to Congress) did not favor unregulated competition. See text accompanying notes 17-27 *supra*. Second, he argued that restraints imposed by other leagues were not as severe as Major League Baseball's reserve system. Brief at 26-27. It is important to recall that as of 1972, the precedents in other sports had not yet been established that make it clear that the antitrust laws permit reasonable restraints on owner's competition for player services, prohibiting only overly restrictive agreements. See, e.g., *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) (applying rule of reason to practices of sports leagues); *McNeil v. National Football League*, 1992-2 *Trade Cas. (CCH)* 1 69,982 (D.Minn.) (specifically applying rule of reason to restraints on player competition such as those challenged in Flood).

n96 Unlike the Flood court, the arbitrator who ultimately abolished the reserve system rejected the owners' reliance claims. Relying on the contract law doctrine that perpetual renewal clauses in contracts must be express, the arbitrator construed the standard player contract and applicable Major League Rules to permit a team to reserve a player's services for only one additional year after a contract expired. The arbitrator gave no weight to the fact that baseball owners (and, given the challenge in Flood, the players as well) assumed that the reserve clause was perpetual, viewing the owners' reliance claims as policy arguments that should not factor into his task of interpreting the contract. *Twelve Clubs Comprising Nat'l League of Professional Baseball Clubs v. Major League Baseball Players Ass'n*, 66 *Lab. Arb. (BNA)* 101 (Dec. 23, 1975).

n97 491 U.S. 164 (1989).

n98 *Id.* at 173.

n99 *Id.* at 174 (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*).

n100 *Id.* at 202 (Brennan, J., concurring in part and dissenting in part) (quoting *Flood*, 407 U.S. at 283).

n101 285 U.S. 393, 446 (1932) (dissenting op.).

n102 427 U.S. at 173.

n103 *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

n104 407 U.S. at 282 ("baseball is a business and it is engaged in interstate commerce").

n105 See *Flood v. Kuhn*, 309 F. Supp. 793, 804 (S.D.N.Y. 1970), aff'd, 443 F.2d 264 (2d Cir. 1971), aff'd, 407 U.S. 258 (1972).

n106 The standard player contract permitted a club to unilaterally renew the contract for one year only, and that, after that one year, the player was a free agent eligible to be signed by any club. *Twelve Clubs Comprising Nat'l League of Professional Baseball Clubs v. Major League Baseball Players Ass'n*, 66 Lab. Arb. (BNA) 101 (Dec. 23, 1975), discussed supra note 96.

n107 *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979).

n108 Players with six years of major league service became "free agents," able to sell their services to the highest bidder; players with two years of experience could submit salary disputes to an independent arbitrator.

n109 Monopoly Sports Leagues, supra note 10, at 676 (citing data).

n110 According to Timothy Mueller, director of KPMG Peat Marwick's sports industry consulting group, the seventies and eighties saw baseball franchise values enjoy an annual compounded increase of 20% to 25%. Anthony Baldo, *Secrets of the Front Office; What America's Pro Teams Are Worth*, FINANCIAL WORLD, July 9, 1991, at 28.

n111 See *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1923 (1992) (Scalia, Kennedy and Thomas, J.J. concurring).

n112 *Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S.Ct. 560, 564 (1991).

n113 *California v. Federal Energy Reg. Comm'n*, 495 U.S. 490 (1990).

n114 Baseball owners could be adversely affected if a decision overruling *Flood v. Kuhn* exposed them to treble damage liability for conduct occurring prior to the decision. Whether this exposure would be unfair would depend on the degree to which, in the Court's judgment, baseball owners had reasonably relied on *Flood*. The owners' argument would be stronger, for example, in a case challenging to the reserve system still imposed on minor league players than it would be in a case challenging broadcasting practices that are probably not within the scope of *Flood* as that case currently stands. See *Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc.*, 541 F. Supp. 263 (S.D. Tex. 1982); Brooks Hearings, supra note *, at 85 (testimony of Gary Roberts). Significantly, the labor exemption would immunize owners from antitrust liability for any restraints on players that occurred during the existence of a collective bargaining agreement. *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979).

Justice Marshall's dissent in *Flood* suggested that baseball's exemption could be overruled prospectively, 407 U.S. at 293 n.5, a notion that the Court had expressly left open in *Simpson v. Union Oil Co.*, 377 U.S. 13, 25 (1964). Although the Court has recently indicated its disapproval of this approach, *Harper v. Virginia Dep't of Taxation*, 113 S.Ct. 2510 (1993), Harper involved the Court's insistence that a rule be applied retroactively against states in favor of individuals, and much of the Court's discussion focused on decisions prospectively applying similar judicial decisions against governments. None of the cases discussed in Harper raised the specter of quasi-penal multiple damages awarded against individuals whose conduct was lawful under the then-prevailing legal rules and thus do not discuss whether independent considerations--such as due process--might compel prospectivity in particular cases.

The Court divided five-to-four in Harper on the question of whether prospective overruling is ever permissible. In light of the controversy and the narrowness of the vote, it is unlikely that a majority of today's Court would feel constrained to uphold *Flood* solely because they would feel bound to apply a decision against baseball owners retroactively in all circumstances.

n115 For an analysis of the legality of those aspects of baseball that most obviously should be maintained, see supra notes 37-55 and accompanying text.

n116 491 U.S. at 174 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS).

n117 352 U.S. 445, 450 (1957).

n118 407 U.S. at 278.

n119 See generally Brooks Report, *supra* note 80; Monopoly Sports Leagues, *supra* note 10.

n120 Brooks Hearings, *supra* note *, at 85.

n121 *Id.* at 82.

n122 This author recently filed a brief, as pro bono counsel to the Consumer Federation of America and Sports Fans United, arguing that the NBA's salary cap is an antitrust violation for the reasons sketched in text. Brief of Amici Curiae Consumer Federation of America and Sports Fans United, *National Basketball Association v. Williams*, No. 94-7709 (2d Cir. 1994).

n123 Murray Chass, Owners Unveil Salary Cap Proposal To a Chilly Reception From Players, *N.Y. TIMES*, June 15, 1994, at B13 (original management proposal to prohibit club payrolls from exceeding 110% of league average); Owners Prepare to Take Players Back, *N.Y. TIMES*, April 2, 1995, Sec. 1 at 1.

n124 See, e.g., *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 118 (1984); *Mackey v. National Football League*, 543 F.2d 606, 621 (8th Cir. 1976); *McCourt v. National Hockey League*, 460 F. Supp. 904, 909-10 (E.D. Mich. 1978), *rev'd on other grounds*, 600 F.2d 1193 (6th Cir. 1979); *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462, 486 (E.D. Pa. 1972). Owners' claims that competition among themselves must be restrained because it would otherwise be "ruinous," or because they need to recoup investments, have been rejected because these claims are not unique to sports leagues. *Mackey*, *supra*, 543 F.2d at 621.

n125 Roberts does not complain about the substantive possibility that the Sherman Act might require increased expansion. Rather, his objections reflect his concern that Sherman Act decisions will be incoherent and that government ought not interfere with choices made by private entrepreneurs. See Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 *TULANE L. REV.* 117, 143-45 (1989).

n126 See *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1392 (9th Cir. 1984) (courts determine if NFL rule "reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public"); *id.* at 1397 (to withstand scrutiny, NFL rules "should be more closely tailored to served the needs inherent in producing the NFL 'product' and competing with other forms of entertainment"); *Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976) ("focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary"). These decisions are faithful applications of the venerable antitrust standard enunciated by Judge William Howard Taft in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 283 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

n127 Major League Agreement, Art. V, section 2(b)(3), reprinted in Brooks Hearings, *supra* note *, at 260.

n128 Brooks Hearings, *supra* note *, at 161, 169; Monopoly Sports Leagues, *supra* note 10, at 665-66.

n129 *Oklahoma Regents*, 468 U.S. at 116 & n.55. This author has elsewhere responded to Roberts' more general claim, Brooks Hearings, *supra* note *, at 88, that "there is no sensible set of principles under current antitrust doctrine to explain when a [sports league] might violate section 1 of the Sherman Act if it grants or rejects a proposal to . . . allow the relocation of a member franchise's home games." In brief, any legitimate justification that seems reasonably necessary to promote their product will be vindicated under the antitrust laws. In contrast, the jury in the Raiders case found that the relocation from Oakland to Los Angeles would not hurt regional rivalries, network schedules or traveling, that Los Angeles could easily accommodate two teams, and that the NFL's claim of commitment to Oakland fans was pretextual in light of its willingness to allow other team to threaten to leave their communities if tax subsidies were not forthcoming. See *id.* at 172-74. In addition, the NFL's refusal to permit the Raiders to relocate was based on a desire to protect the Los Angeles Rams from competition for local fans within its geographic market.

n130 *Id.* at 85.

The text makes no confident claim about the most analytically difficult issue concerning antitrust and baseball--the impact that the Sherman Act would have on the minor leagues. A full discussion of this issue is beyond the scope of this Article, but this author has touched on it in somewhat greater detail elsewhere. See Monopoly Sports Leagues, *supra* note 10, at 690-95 (arguing that without trade restraints, minor leagues funded by major league teams or operated independently would continue to develop players). It is noteworthy that in recent congressional hearings on this issue, industry witnesses did not identify a single agreement involving the minor leagues that was both essential to permit minor league baseball to continue operating in substantially the same manner as it has in the past and that would be

illegal under the Sherman Act. Brooks Hearings, *supra* note *, at 62-67 (testimony of Jimmie Lee Solomon, Major League Baseball Director of Minor League Operation); *id.* at 69-74 (testimony of Stanley Brand, Vice President, National Ass'n of Professional Baseball Leagues). If, however, such an agreement were to be identified, the courts could, consistent with the analysis suggested herein, find the restriction to be the only remaining "unique characteristic and need" of baseball and thus continue the exemption for that limited purpose.

n131 As rookie expansion franchises, the Colorado Rockies attracted a record attendance of 4,483,270 and the Florida Marlins drew 3,064,847. Dave Anderson, *The Year in Review -- 1993; Too Little to Cheer, Too Much to Mourn*, N.Y. TIMES, Dec. 26, 1993, Sec. 8, p.1. See also Monopoly Sports Leagues, *supra* note 10, at 664-65. Moreover, these purists overemphasize the degree to which expansion reduces the quality of the game for the average fan. (For example, the claim that expansion has significantly reduced the quality of major league pitching must be counterbalanced by the average fan's recognized preference for high scoring games.) As matter of general legal and economic policy, of course, baseball should no more be able to limit expansion than should the Big Three automakers be able to limit production to Cadillacs, Lincolns and New Yorkers on the grounds that expanding output to produce Vegas and Escorts would reduce quality.

n132 A comprehensive review of the economics of baseball agrees that baseball owners will set prices in order to maximize revenue and their costs are ignored in this calculation. ANDREW ZIMBALIST, *BASEBALL AND BILLIONS* 53 (1992).

Because a more competitive environment leads to more exciting pennant races and does not increase ticket prices, it is irrelevant that competition might lead to player salaries that some might consider "unreasonable." Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (rejecting "reasonable price" defense to price fixing). In any event, recent data showing that 50% of Major League Baseball players earned less than \$ 410,000 per year, with a professional life of less than six years, and that the 58% of revenue devoted to player salaries is comparable to that spent on salaries in other labor-intensive businesses, such as advertising and business consulting (and less than the 75% spent by many law firms!) demonstrates why the Supreme Court has been unwilling to allow any determination of whether prices or salaries are, in fact, "reasonable." See Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORT LAW 287, 291 (1994); Timothy K. Smith & Erle Norton, *Throwing Curves*, WALL ST. J., Apr. 2, 1993, at A1.

n133 In the majority opinion in *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1453 (1994), Justice Kennedy wrote that Congressional inaction was not indicative of authoritative congressional intent, citing his own opinion in *Patterson*, 491 U.S. at 175 n.1, and Justice Scalia's dissent in *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 671-72 (1987). Kennedy's opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas.

n134 *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 629-30 n.7 (1987).

n135 491 U.S. at 202 (quoting *Flood*, 407 U.S. at 283).

n136 *Steelworkers v. Weber*, 443 U.S. 193 (1979).

n137 *Johnson*, 480 U.S. at 629-30 n.7. The Justices comprising the majority in *Johnson* and the minority in *Patterson* continue to adhere to this view. Their position was bolstered by the passage of the Civil Rights Act of 1991, 105 Stat. 1071, which overruled a host of Supreme Court decisions interpreting Title VII. See *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2765-66 (1993) (Stevens, J., dissenting). See also *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1458 (Souter, J., dissenting) (lower court decisions should not be overruled because Congress had comprehensively revised the relevant statute in 1975 without disturbing these decisions).

n138 *Patterson*, 491 U.S. at 202-03.

n139 For an explanation of why the recent unsuccessful efforts to legislatively overrule *Flood* do not indicate congressional endorsement for the continued legality of Major League Baseball practices, see notes 75-83 *supra* and accompanying text.

n140 One of the principal pieces of evidence of *Flood* relied on in inferring congressional support for the reserve clause was a 1952 House Committee Report, which concluded that "the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause." 407 U.S. at 272 (quoting H.R. Rep. No. 2002, 82d Cong.,

2d Sess. 229 (1952)). The same report, however, refused to give "carte blanche immunity" to baseball, primarily because of the subcommittee's concerns about expansion and relocation issues:

the restrictions on transfer of baseball franchises, together with the enforcement of those restrictions, have prevented the composition of the major leagues from reflecting the tremendous population shifts which have occurred in the United States since 1903. Immunity for such restrictions would certainly tend to perpetuate the status quo.

H.R. Rep. No. 2002, Id. at 230.

n141 Sara Fritz, Two Senators' Price of Legislation: Rozelle's Promise of NFL Expansion, L.A. TIMES, Dec. 5, 1985, Pt. 3, at 13. See also note 79 *supra*.

n142 Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. section 1291-95) (Supp. IV 1986)).

n143 In his recent confirmation hearings, Justice Stephen Breyer directly addressed the questions he would ask in considering whether to reconsider a precedent:

How wrong do you think that prior precedent really was as a matter of law? That is, how badly reasoned was it? You ask yourself how the law has changed since -- all the adjacent laws, all the adjacent rules and regulations. Does it no longer fit? You ask yourself how have the facts changed. Has the world changed in very important ways? You ask yourself, insofar -- irrespective of how wrong that prior decision was -- as a matter of reasoning, how as it worked out in practice? Has it proved impossible or very difficult to administer? Has it really confused matters? And finally you look to the degree of reliance that people have had in their ordinary lives on that previous precedent.

Confirmation hearings of Justice Stephen Breyer, July 12, 1994.

It is significant, of course, that legislative inaction is not a factor Justice Breyer listed. Whatever the merits of Flood's reasoning, it is clear that the "adjacent" rules of antitrust and joint ventures have changed significantly since Flood, see Part I-B, *supra*; the facts and the world have changed in "important ways," significantly suggesting that free agency would not ruin our National Pastime, see Part I-A, *supra*; "in practice" baseball's antitrust exemption has caused significant consumer harm, see Part III-C, *supra*; recent judicial decisions questioning the scope of the exemption have created confusion; and there has not been significant justifiable reliance by Major League Baseball owners on the exemption for their practices concerning imposition of salary caps, franchise expansion and relocation, and broadcast rights sales, see Part II-B, *supra*. Thus, the answers to the questions Justice Breyer would pose suggests that he would join in voting to reconsider Flood.

n144 491 U.S. at 176 n.1 (quoting *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72) (1987) (Scalia, J., dissenting)).

n145 285 U.S. 393, 446 (1932).

n146 Brandeis was discussing constitutional precedents, but the methodology should be the same for statutory decisions. The difference, as Brandeis noted, is that judicial decisions interpreting statutes can be corrected by legislation, although he catalogued many Court opinions overruling statutory decisions "in matters deemed important." *Id.* at 406 & n.1.

n147 *Id.* at 411.

n148 *Id.* at 412 & n.9 (citing Roscoe Pound, The Theory of Judicial Decision, 36 HARV. L. REV. 641, 651 (1923); Ray A. Brown, Due Process of Law, Police Power, and the Supreme Court, 40 HARV. L. REV. (1927); Note, Police Power -- Legislation for Health and Personal Safety, 42 HARV. L. REV. 866, 867, 872 (1929); Percy H. Winfield, Public Policy in the English Common Law, 42 HARV. L. REV. 76, 101, 102 (1928); III CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 470, 471.

n149 *Id.* at 412.

n150 An alternative view of the Court's treatment of the antitrust exemption is that Brandeis' approach is wrong and that courts should not interpret statutes based on their experience and perception of social welfare. Unless a court is being disingenuous, however, the only way for it to determine whether to give stare decisis effect to a precedent would seem to be: (1) to adopt a strict rule that statutory precedents are never overruled; (2) to give the precedent only the weight that its persuasiveness merits; or (3) to exercise judicial discretion. The overwhelming weight of both judicial

precedent and sound arguments caution against implementing a strict rule against overruling. For light-hearted but telling criticism of this alternative view, see William N. Eskridge, Jr., The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases, 88 *MICH. L. REV.* 2450 (1990).

n151 407 U.S. at 283.